Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13
	)	

REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these Reply Comments related to the Notice of Proposed Rulemaking in this proceeding (NPRM), released January 28, 1992. USTA did not file initial comments. However, in view of the significance of the issue, USTA is filing these Reply Comments.

USTA is the principal national trade association of exchange carriers, whose more than 1000 members provide nearly all of the exchange carrier provided access lines in the United States. The USTA interest represented here is that of exchange carriers alone.

The Commission's NPRM addresses the fundamental lawfulness of its forbearance policy, and possible alternatives to this policy. The Commission asks, first, if it has authority under sections 4(i) and 203 of the Communications Act (Act) to continue to permit nondominant carriers not to file tariffs. NPRM at ¶8. It then looks at possible alternative means of regulation in the event forbearance regulation is unlawful.

USTA concurs that forbearance by the Commission from requiring compliance by interstate carriers with the terms of section 203 of the Act is not within the scheme intended by Congress. In addition, section 4(i) does not expand or confirm the Commission's authority to forbear here, where the statutory scheme is detailed and express. See New England Telephone v. FCC, 826 F.2d 1101 (D.C. Cir. 1987). Nor does subsequent action in the areas identified by the NPRM alter this result. Congress has not changed section 203 in relevant part. (USTA takes no position at this time as to whether Title III affords any basis for treating radio common carriers differently in their provision of interstate common carrier services. However, such carriers certainly must bear the burden of showing that the sections they rely upon are sufficiently specific so as to justify a conclusion that section 203 is inapplicable to them.)

In MCI v. FCC, a 1985 case that remains the only court assessment of Commission's action in CC Docket No. 79-252, the District of Columbia Circuit specifically distinguished the language of section 203(b)(2) of the Act as anticipating only "circumscribed alterations" and not "wholesale abandonment or elimination of a requirement" of the statute. The Court's decision stated that the Commission's view on mandated removal of tariffing "departs from any plausible reading of the statute's text." It further stated that the FCC "lacked authority to prohibit...carriers from filing tariffs that, by statute, every common carrier shall file." (emphasis added). MCI v. FCC, 765

F.2d 1186 (D.C. Cir. 1985). Notwithstanding the claim in many comments, the issue is not whether Congress subsequently approved of an administrative practice by its inaction, or even indirect action. There is a recognized plain meaning to the statute. Such plain meaning controls in the absence of actual change in the relevant portion of section 203 by Congress in the interim after the 1985 decision.

The comments that recite that Maislin Industries v. Primary Steel, 110 S.Ct. 2259, 111 L.Ed. 2d 94 (1990) is not directly controlling are correct in that the specific statute addressed in that case obviously is not the same Act that is at issue here. However, while not dispositive, Maislin certainly sends a strong signal concerning the nature of the Communications Act framework.

The Maislin decision cited in the NPRM underscores the central reason behind a requirement for the filing of prices. The specific rates filed by carriers were viewed by the Supreme Court as "utterly central" to the Interstate Commerce Act because they allow customers to determine the actual level of the rates that are "held out" to all, and they provide the regulatory agency the information needed to deal with claims that other customers are paying separately bargained, lower rates. Maislin Industries v. Primary Steel, supra, 110 SCt. at 2769. Maislin itself also shows that forbearance itself cannot be viewed as a form of regulation. Section 203 of the Act contemplates affirmative action by carriers to comply with its requirements.

These two cases strongly suggest that complete forbearance by the Commission from requiring that interstate carriers comply with the requirements of section 203(b)(2) of the Act is unlawful, because it removes a central protection that was intended by Congress to be available to the Commission with respect to all common carriers. The Commission lacks discretion to rewrite the statute or abdicate its responsibility, regardless of its view of the policy benefits.

As to the policy benefits raised in the comments, it is by no means clear that incomplete or selective forbearance in a market provides a net benefit to the public. Contrary to the arguments of many commenters, there would be no net detriment by recognizing that such forbearance is inconsistent with the Act. The Commission can take other action. The policy benefits of forbearance can be achieved in a more equitable fashion through other means, including streamlined regulation that treats all competitors equally in a market where there is competition. Continued pervasive regulation of incumbent companies in the face of freedom of entry for essentially unregulated competitors introduces a host of distortions. See, in particular, A.E. Kahn, The Economics of Regulation (MIT, 1988), Introduction: A Postscript, Seventeen Years After, at xxxv-vi. Kahn notes that a significant percentage of today's competition may represent the evasion of sunk costs or the transfer of costs to captive customers, with no assurance that the underlying policy is either socially rational or conducive to economic efficiency.

In today's marketplace, the Commission should reject regulation that forces competitors into diametrically opposite regulatory schemes, without providing the streamlining that competition merits for each. In particular, the growth of competition in various interstate markets is a factor that should be taken into account in this proceeding, not as a justification to evade the dictates of the Act, but as a reason to revisit the issue and to work within the scheme of the Act as suggested by MCI v. AT&T and Maislin.

The MCI v. FCC court recognized that the Commission could streamline tariff filing requirements and cost support, and that to some degree this would be available as a regulatory tool even though the Commission may lack power to forbear completely from requiring tariffs for interstate common carrier services. From a policy perspective, this provides a basis for the Commission to act in a more targeted fashion to achieve the public interest, by adjusting regulatory requirements for all carriers under its authority based on the competitiveness of the marketplace. Many states have rejected the forbearance alternative in favor of a consistent and common regulatory scheme for all carriers based on individual services and the competitiveness of the market for such services.

Such action would avoid the asymmetric and inefficient boundary lines of "dominance" and "nondominance," and would allow change to reflect the existence of competition. The flexibility

of streamlining better accommodates market-responsive change. In contrast, total forbearance maintains a wide gulf between two groups of market competitors, and wastes opportunities to use beneficial efficiencies for public benefit.

Complete forbearance from section 203 requirements is inconsistent with the most reasonable reading of the Communications Act scheme in light of Maislin. In addition, rejection of complete forbearance in favor of evolving, market-responsive streamlining offers superior policy benefits in dealing with competition among interstate carriers in the multifaceted interstate service market, and in ensuring fairness to all customers of interstate common carriers.

Respectfully submitted,

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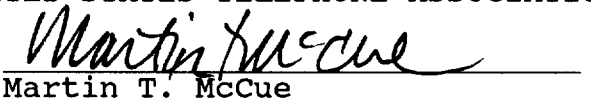
BY 

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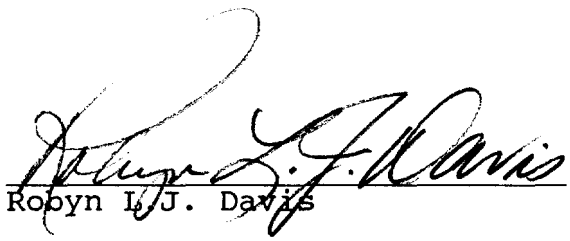
April 29, 1992

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on April 29, 1992 copies of the foregoing Reply Comments of of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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